

# RECOVERY ACT BULLETIN

NUMBER: 10-08

SUBJECT: ARRA CONTRACT TERMS AND CONDITIONS

DATE ISSUED:  
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REFERENCES:  
AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA)

SUPERSEDES:

TO: Agency Secretaries  
Department Directors  
Departmental Budget Officers  
Departmental Accounting Officers  
Department of Finance Budget Staff

FROM: California Recovery Task Force

**This bulletin describes updated supplemental Terms and Conditions designed for contracts funded by the American Recovery and Reinvestment Act.**

**Purpose** The purpose of this bulletin is to provide updated guidance on the Terms and Conditions (T's & C's) designed to supplement standard state contract provisions for contracts funded by the American Recovery and Reinvestment Act (ARRA). Specifically, this bulletin provides updated guidance on Section 1605, Subpart B, of ARRA, commonly referred to as the "Buy American" provision (Buy American).

**Terms and Conditions** The Department of General Services (DGS) has updated the attached supplemental T's & C's, which departments shall use when conducting procurements and issuing contracts funded by ARRA.

Clause #4 of the T's & C's, *REQUIRED USE OF AMERICAN IRON, STEEL AND OTHER MANUFACTURED GOODS*, has been modified to clarify that, for specified projects, neither the Contractor nor its subcontractors will use ARRA funds unless all of the iron, steel and manufactured goods used in the project are produced in the United States **or** in a manner consistent with United States obligations under international agreements, **in accordance with ARRA Section 1605 and applicable federal regulations (Code of Federal Regulations, Title II, Part 176).**

These T's & C's shall supplement - not replace - standard state contract provisions, including, but not limited to, the General Terms and Conditions (GTC 307), General Provisions (GSPD-401) and Information Technology General Provisions (GSPD-401-IT). Departments expending ARRA funds are cautioned not to rely solely on these supplemental T's & C's to ensure that all federal requirements are included. Departments must work closely with their federal funding partners, as well as their legal counsel, to ensure that any additional federal requirements associated with ARRA funding are appropriately included in solicitation and contract documents.

**Section 1605: "Buy American"** The Statutory Requirement for Section 1605 of ARRA, as provided in the Electronic Code of Federal Regulations, Title 2, Section 176, Subpart B—*Buy American Requirement Under Section 1605 of the American Recovery and Reinvestment Act of 2009* ([http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title02/2cfr176\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title02/2cfr176_main_02.tpl)), "prohibits use of Recovery funds for a project for the construction, alteration, maintenance, or repair of a public

building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” There are, however, circumstances in which exceptions to this prohibition exist. These exceptions are outlined below.

### **Waiver Exemptions**

Section 1605 provides for waiver exemptions to Buy American under three circumstances:

- (a) If iron, steel, or relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
- (b) If the inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent; or
- (c) If applying the domestic preference would be inconsistent with the public interest.

A waiver exemption may be issued by the federal agency under which the ARRA funding is administered. In some circumstances, blanket waiver exemptions have been granted for specific programs. It is advised that departments refer to their parent federal agencies for a listing of current waivers in effect.

### **Obligations Under International Agreements**

Section 1605(d) provides that Buy American prohibition be applied in a manner consistent with U.S. obligations under international agreements. Buy American prohibition is not required when an international agreement is in place that obligates recipients to treat the goods and services of a Party the same as domestic goods and services when that Party is a participant in one of the following agreements:

1. The World Trade Organization Government Procurement Agreement (Aruba, Austria, Belgium, Bulgaria, Canada, Chinese Taipei (Taiwan), Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and United Kingdom);
2. Any of the following free trade agreements:
  - i. Dominican Republic-Central America-United States Free Trade Agreement (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua);
  - ii. North American Free Trade Agreement (NAFTA) (Canada and Mexico);
  - iii. United States-Australia Free Trade Agreement;
  - iv. United States-Bahrain Free Trade Agreement;
  - v. United States-Chile Free Trade Agreement;
  - vi. United States-Israel Free Trade Agreement;
  - vii. United States-Morocco Free Trade Agreement;
  - viii. United States-Oman Free Trade Agreement;
  - ix. United States-Peru Trade Promotion Agreement; and
  - x. United States-Singapore Free Trade Agreement.
3. United States-European Communities Exchange of Letters (May 15, 1995): Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and United Kingdom; and
4. Agreement between the Government of Canada and the Government of the United States of America on Government Procurement.

To view the specific agreements in effect for California executive branch agencies and other ARRA programs ("other entities") that may have recipients in California, departments are encouraged to review the Electronic Code of Federal Regulations, Title 2, Section 176, Appendix to Subpart B—*U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements (as of February 16, 2010)* (<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=98063efad52046e1db3c869662b0a67a&rqn=div9&view=text&node=2:1.1.1.7.11.2.1.13.3&idno=2>).

Notably, a U.S.-Canada Agreement on Government Procurement, dated February 16, 2010, excludes Canadian Iron, steel and manufactured products from Buy American prohibition for the following programs:

1. U.S. Department of Agriculture, Rural Utilities Service, *Water and Waste Disposal Programs*;
2. U.S. Department of Agriculture, Rural Housing Service, *Community Facilities Program*;
3. U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *Energy Efficiency and Conservation Block Grants*;
4. U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *State Energy Program*;
5. U. S. Department of Housing and Urban Development, Office of Community Planning and Development, *Community Development Block Grants Recovery (CDBG-R)*;
6. U. S. Department of Housing and Urban Development, Office of Public and Indian Housing, *Public Housing Capital Fund* ; and
7. U.S. Environmental Protection Agency, *Clean Water and Drinking Water State Revolving Funds*, for projects funded by reallocated ARRA funds where the contracts are signed after February 17, 2010.

As of January 1, 2010, relevant international obligations affect Buy American prohibition only when a project has a value equal to or greater than \$7,804,000.

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## Contact

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